Supreme Court, U.S.
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No. OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

GEORGE JACKSON,

Petitioner,

VS.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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59 pp

QUESTIONS PRESENTED

Petitioner George Jackson was convicted of conspiracy to violate the Lacey Act, 16 U.S.C. §§ 3372(a)(2)(A) and 3373(d)(1)(B), and substantive Lacey Act violations. The alleged scheme involved the processing of eggs from Lake Ontario salmon into caviar, which then was sold for human consumption. A New York regulation (6 N.Y.C.R.R. § 37.1) purportedly prohibited the sale of salmon eggs from Lake Ontario as anything other than bait. Jackson's sole defense at trial was that he did not know that the sale of Lake Ontario salmon eggs for human consumption was illegal. On this issue the prosecutor's case rested upon a former Food and Drug Administration investigator who testified that Jackson had stated to her that he was aware of New York's regulatory ban on such sales. The prosecutor failed to disclose Jackson's alleged statements prior to trial.

The following questions are presented:

1. What is meant by "government agent", "interrogation", and "before or after arrest", in Fed. R. Crim. P. 16(a)(1)(A)?

2. In what manner should a prosecutor provide Rule 16(a)(1)(A) materials to defense counsel?

3. Was Jackson prejudiced by the prosecutor's failure to comply with Rule 16?

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PETITION FOR A WRIT OF CERTIORARI

George Jackson respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit in this case.

OPINIONS BELOW

The summary order of the Court of Appeals (App., *infra*, *1*) is not reported. The opinion and order of the District Court, deciding post-trial motions, (App, 6) also is not reported.

JURISDICTION

The judgment of the Court of Appeals was entered on January 12, 1996. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Rule 16(a)(1)(A) of the Federal Rules of Criminal Procedure, entitled "Governmental Disclosure of Evidence," provides, in pertinent part:

> **(A) Statement of Defendant.** Upon request of a defendant the government must disclose to the defendant and make available for inspection, copying, or photographing: . . . that portion of any written record containing the substance of any relevant oral statement made by the defendant whether before or after arrest in response to interrogation by any person then known to the defendant to be a government agent; . . . . The government must also disclose to the defendant the substance of any other relevant oral statement made by the defendant whether before or after arrest in response to interrogation by any person then known by the defendant to be a government agent if the government intends to use that statement at trial.

STATEMENT OF THE CASE

The Charges and Petitioner's Defense

George Jackson's formal education ended in the seventh grade. For a few years prior to 1989 Mr. Jackson was a part-time employee of Tempotech Industries, Inc. ("Tempotech"), working at Tempotech's facility in Hart, Michigan, during the fall salmon spawning season. In the off-season he generally worked at fish processing plants in Alaska. Tr., 9/28/94,

p. 67-68.[1] Starting in 1989 Mr. Jackson became a full-time Tempotech employee.

The Lacey Act violations were based upon a New York regulation (6 N.Y.C.R.R. § 37.1) that purportedly prohibited the sale of salmon eggs from Lake Ontario as anything other than bait. The scheme, according to the indictment, involved the acquisition by Tempotech employees working in Pulaski, New York, of Lake Ontario salmon eggs. Thereafter Tempotech employees processed these eggs into caviar at a Tempotech facility in Pulaski. If the volume of eggs acquired by the Pulaski employees exceeded the processing capacity of the Pulaski facility, Tempotech would air freight these eggs to the Hart, Michigan, plant for processing. Once the eggs were processed into caviar in Pulaski, that caviar was shipped to Hart. Thereafter this caviar was sold in New York and elsewhere, including Japan.

Mr. Jackson never was employed at Tempotech's Pulaski facility and indeed never had been to Pulaski. His sole defense at trial was that he did not know that the sale of Lake Ontario salmon eggs for human consumption was illegal. Prior to trial Mr. Jackson was unaware of any evidence inconsistent with this defense.

Investigator Gould of the Food and Drug Administration

In an Order deciding post-trial defense motions, the District Court stated as follows:

> In contrast to the Gehl defendants, the prosecution case against Jackson rested heavily upon the strength of one witness, Wendy Gould, a former FDA inspector. Mr. Jackson's defense was that he did not know that the sale of Lake Ontario salmon eggs for human consumption was illegal. Essentially,

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[1] The trial transcript shall be cited as "Tr.", with a reference to the date and page.

> Ms. Gould testified that in a conversation between she and Mr. Jackson, he acknowledged that he was aware of New York's regulatory ban on such sales.

App., *infra*, *32*.

Indeed, Investigator Gould's testimony was direct and to the point:

> A. [By investigator Gould] . . . Both Mr. Jackson and Mr. Gehl told me that they knew it was illegal to use the New York eggs to produce caviar . . . .
>
> Q. [By the prosecutor] . . . I want to be very clear, that information was provided to you by George Jackson?
>
> A. That information was provided to me by both Mr. Jackson during inspection, and Mr. Gehl at the conclusion of the inspection on two separate occasions. . . .

Tr., 10/3/94, p. 11-12.

This evidence of Mr. Jackson's alleged statements was stark, dramatic, and directly contradictory to his defense. Yet the evidence was not disclosed to defense counsel until three days after the trial commenced. C.A. App. 1347-1348.

In addition to the failure to disclose these alleged oral statements by Mr. Jackson, the prosecutor also failed to properly disclose Investigator Gould's written reports and notes, which allegedly contained the substance of relevant oral statements by Mr. Jackson.

With respect to Investigator Gould's written inspection reports, these were obtained by the Government in "early '93" (trial commenced in September, 1994). At some point in the summer of 1994 the reports apparently were turned over to defense counsel by the Government's case agent, an investigator with the New York State Department of Environmental Conservation ("DEC"). The investigator provided them to

defense counsel, however, only as two documents among "the whole packet from the Food and Drug Administration;" he turned over other packets as well. Tr., 9/29/94, p. 106-107. Neither he nor anyone else *ever* identified these documents as ones "containing the substance of . . . relevant oral statement[s]" made by Mr. Jackson. And no one reading the documents themselves, without guidance, would ever conclude that they were in any was the basis for Investigator Gould's testimony as to Mr. Jackson's alleged statements.

We respectfully submit that the "written record" provision of Rule 16(a)(1)(A) is not satisfied by having a government agent turn over documents, the relevance of which is not apparent, buried among others during document discovery.

The second type of "written record" which allegedly contained the substance of oral statements made by Mr. Jackson was Investigator Gould's handwritten notes. C.A. App. 1302. The Government asserts that they were produced to defense counsel eleven days prior to the commencement of trial. Assuming this to be accurate, again, no one on behalf of the Government identified these notes as "containing the substance of . . . relevant oral statement[s]" made by Mr. Jackson. In addition, no one "reading" the notes (to the extent they were decipherable) would ever conclude that they were the basis for investigator Gould's testimony as to Mr. Jackson's alleged statements.

The Government's omissions in these respects were compounded by the fact that the prosecutor did it the *correct way* with regard to *another* alleged oral statement by Mr. Jackson, but one that had nothing to do with Investigator Gould. On October 15, 1993, defense counsel was advised in writing by the prosecutor of an alleged oral statement made by Mr. Jackson to *the DEC investigator*. In short, Mr. Jackson was lulled into the belief that the only oral statement that he had to be concerned about (and which in fact was of no concern at all) was the one made to the DEC investigator. C.A. App. 1040.

Significantly, the prosecutor's failure to disclose this evidence, which was crucial to the case against Mr. Jackson, was

not an oversight but rather was a conscious, knowing, and intentional decision. Government's Supplemental Appendix, 206-207; Government Brief below, p. 19, ftn. 13. It appears to be the position of the prosecutor that Rule 16 disclosure was not required here because Investigator Gould was not a "government agent" and because "before or after arrest" there was no "interrogation."

In fact, Gould's reports identify her as an "investigator". C.A. App. 1297. According to her own testimony, she was at the Tempotech facility, and asking questions of Mr. Jackson, in order to investigate allegations "that Tempotech has been receiving New York eggs and making caviar, which was illegal . . . ." and in order to "try to determine if they were, in fact, using New York eggs for the production of caviar." C.A. App. 1287. She visited the facility four different times, all for the purpose of "determin[ing] if they were still receiving New York eggs; and if so, if these eggs were being used for production of caviar." C.A. App. 1292. Her final visit was because she and the FDA did not believe that what they were being told "was necessarily true." C.A. App. 1292-1293.

Prior to questioning Mr. Jackson, Investigator Gould displayed to him her credentials, including her badge. She did not "flash" them, because, in her words, "that's a little ominous" and "it can be a little nerve-wracking to some people." C.A. App. 1299. She also showed Mr. Jackson, prior to questioning him, a formal "Notice of Inspection". Government's Supplemental Appendix, 218. First, on this formal government form, Ms. Gould identified herself as an "investigator". Second, surely an unsophisticated layperson, with a seventh grade education, would conclude from this Notice, on top of the badge and credentials, that the person he was dealing with was one of authority, who had the power of the federal government behind her.

Finally, Investigator Gould's sleuthing, and her reports, were in support of a criminal investigation. On September 14, 1990, the FDA sent to the IRS Criminal Investigation Division a variety of documents pertaining to Tempotech, including

Investigator Gould's "Establishment Inspection Report". The covering letter, a copy of which was sent to Investigator Gould, states: "These documents are being furnished to you as part of our cooperative law enforcement efforts." Government's Supplemental Appendix, 307. According to her notebook, Investigator Gould herself "spoke to Norm Meadows, IRS" on the previous day, September 13, 1990, for half an hour. Tr., 10/3/94, morning session, p. 46. During this same month, and in October of 1990, Gould continued to visit the Tempotech facility, and to question Mr. Jackson.

Under these circumstances, and since the factual issues underlying the Lacey Act charges against Mr. Jackson are *identical* to the factual issues which Gould was investigating, it would be the height of elevation of form over substance to deny the applicability here of the mandatory provisions of Rule 16(a)(1)(A).

Prejudice to Petitioner

The prosecutor's failure to comply with Rule 16 substantially prejudiced Mr. Jackson, particularly with respect to trial preparation that could have been pursued and with respect to trial and plea strategy.

First, the Government's failure to comply with Rule 16(a)(1)(A) precluded Mr. Jackson from pursuing, pre-trial, areas of investigation which clearly could have influenced the jury's view of Investigator Gould. After the trial, in November, 1994, Mr. Jackson learned of a prior civil lawsuit, in Michigan, which was based in part on allegedly improper acts by Investigator Gould in her role as an FDA investigator.

If prior to trial Mr. Jackson had known of Investigator Gould's potentially devastating testimony he would have investigated her background then, just as he undertook to do post-trial. In this fashion he would have learned, pre-trial, of the allegations of impropriety by Gould. Mr. Jackson also would have interviewed those making the allegations, and pursued whatever further leads developed. In addition, Mr. Jackson surely would have issued a trial subpoena for the

FDA's personnel file on Investigator Gould and for any other agency files pertaining to the allegations of improper conduct. He would have been particularly interested in, and Investigator Gould would have been cross-examined about, whether the allegations of impropriety had anything to do with the subsequent termination of her employment at FDA.

The Government's failure to comply with Rule 16(a)(1)(A) precluded Mr. Jackson from pursuing in a timely fashion areas of investigation such as these, which clearly could have influenced the jury's view of Investigator Gould, who provided the Government's *sole* evidence on the element of Jackson's alleged knowledge of the regulatory ban.

With respect to trial and plea strategy, it is obvious that Investigator Gould's testimony, which directly contradicted Mr. Jackson's defense, would have significantly affected his strategy, in both of these areas, if disclosed prior to trial. As stated in *United States v. Padrone*, 406 F.2d 560, 561 (2d Cir. 1969), "where it is apparent, as here, that [the defendant's] defense strategy may have been determined by the failure to comply, there should be a new trial." See also *United States v. Alvarez*, 987 F.2d 77, 85 (lst Cir. 1993) (failure to disclose "deprived [the defendant] of the opportunity to design an intelligent litigation or plea strategy that responded to the alleged statement").

As a specific example of impact on trial strategy, Mr. Jackson's attorney did not learn of Investigator Gould's devastating testimony that "Jackson . . . told me that [he] knew it was illegal to use the New York eggs to produce caviar" until *after* opening statements were made. The prosecutor knew of this testimony *at least* a week earlier, prior to opening statements. If defense counsel had known of Gould's expected testimony it obviously would have been addressed in the opening and counsel never would have argued that there would be "little evidence" against Mr. Jackson. In this fashion the jury might have been "prepared" for this testimony, which not only was stark and dramatic but which also, as the District Court found, was the strength of the prosecution case against Mr. Jackson.

Finally, the prejudice to Mr. Jackson caused by the Government's failure to comply with Rule 16 was directly compounded when the prosecutor, in his *opening* summation, told the jury:

> Now, ladies and gentlemen, the judge is going to tell you in this case that the defendants were under no obligation whatsoever to call any witnesses and that, of course, is true. The Government has the burden of proof and we gladly assume that burden.
>
> But that doesn't mean that they couldn't call witnesses if they wanted to. Don't think for one second that if there wasn't -- if there was someone out there who could have come in and said it ain't so, that they couldn't have called them in a second and --

C.A. App. 84-85. Defense counsel immediately objected and moved for a mistrial. The District Court denied the motions but gave a "curative" instruction to the jury. C.A. App. 8588. In an Order resolving post-trial motions the Court found that this statement by the prosecutor was "manifestly intended . . . to be a comment on the failure of the accused to testify." C.A. App. 1016.

As noted by the District Court, "the prosecution case against defendant Jackson rested heavily upon the strength of one witness, Wendy Gould." C.A. App. 1023. Indeed, Mr. Jackson's defense was that he did not know that the sale of Lake Ontario Salmon eggs for human consumption was illegal. Mr. Jackson submits that the *sole* evidence against him on this fundamental issue of his knowledge of the regulatory ban was Gould's testimony as to purported conversations between them. Therefore when the prosecutor made his improper statements the jury would have focused on Investigator Gould, and concluded that she must be telling the truth, because otherwise Mr. Jackson, who was in the courtroom and heard her testimony, would have been called "in a second" and "said it ain't so," i.e., testified as to his version of the conversations.

Thus the prosecutor's improper statements presumably caused the jury to focus upon, and give additional weight to, Gould's "uncontradicted" testimony, which testimony in turn had been improperly bolstered by Jackson's inability to fully cross-examine her because of the Rule 16(a)(1)(A) violation. In short, one error compounded the other, with the result that, in tandem, they clearly amounted to substantial prejudice to Mr. Jackson.

Jurisdiction Below

The District Court possessed subject matter jurisdiction over the case pursuant to 18 U.S.C. § 3231. The basis for jurisdiction in the Court of Appeals was 28 U.S.C. § 1291 and 18 U.S.C. §§ 3557 and 3742.

REASONS FOR GRANTING THE PETITION

The fact that petitioner was unjustly convicted, and now is serving a term of imprisonment which, even if he were guilty, is, under the circumstances, draconian, probably does not qualify as a "special and important reason" for the granting of a writ of certiorari. However, the underlying issue, i.e., the meaning of Rule 16(a)(1)(A) and the manner in which prosecutors comply with the Rule, does meet this test.

Significant discovery in criminal cases was a long time in coming. (Wright, Federal Practice and Procedure: Criminal 2d § 252.) Even now it is of limited scope, and cannot compare to the very broad discovery that is routine and mandated in civil actions, where what is at stake is only money and property, not, as with petitioner, five years and ten months of freedom. (For example, in criminal cases motions for bills of particulars are rarely granted, depositions generally are unavailable, and the narrow requirement of the Jencks Act frequently is met on the eve of trial. See Sarokin & Zuckerman, "Presumed Innocent? Restrictions on Criminal Discovery in Federal Court Belie This Presumption," 1991, 43 Rutgers L. Rev. 1089.)

Under these circumstances, the limited discovery that is available in a criminal case should be provided fully and

freely. This is particularly true, we submit, with respect to the accused's own alleged statements, which obviously have vast potential to be incriminating, and also frequently form the primary basis for the defendant's plea and trial strategy.

This Court should give direction to prosecutors and the defense bar as to the meaning of Rule 16(a)(1)(A), its general applicability, and the process to be followed in complying with the Rule.

CONCLUSION

The petition for a writ of certiorari should be granted.

RESPECTFULLY SUBMITTED,

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APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SUMMARY ORDER

NDNY-syny
93-cr-300
McCurn

THIS SUMMARY ORDER WILL NOT BE PUBLISHED IN THE FEDERAL REPORTER AND MAY NOT BE CITED AS PRECEDENTIAL AUTHORITY TO THIS OR ANY OTHER COURT, BUT MAY BE CALLED TO THE ATTENTION OF THIS OR ANY OTHER COURT IN A SUBSEQUENT STAGE OF THIS CASE, IN A RELATED CASE, OR IN ANY CASE FOR PURPOSES OF COLLATERAL ESTOPPEL OR RES JUDICATA.

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on the 12th day of January, one thousand nine hundred and ninety-six.

PRESENT:

Honorable Pierre N. Leval
Honorable Guido Calabresi
Circuit Judges,
Honorable Arthur Spatt,*
District Judge

United States Court
of Appeals
Second Circuit
Filed
Jan 12 1996
George Lange III,
Clerk

UNITED STATES OF AMERICA,

Appellee,

v.

95-1097 (L),
95-1113 & 95-1433

TEMPOTECH INDUSTRIES, INC., GEHL PRODUCTIONS, LTD., ROBERT J. GEHL, GEORGE JACKSON,

Defendants-Appellants.

* **United States District Judge, Eastern District of New York, sitting by designation.**

APPEARING FOR APPELLEE:

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Richard E. Zuckerman, Honigman Miller Schwartz and Cohn, Detroit, Michigan

APPEARING FOR APPELLANT GEORGE JACKSON:

George H. Lowe, Bond, Schoeneck & King, Syracuse, New York

Appeal from the United States District Court for the Northern District of New York (Neal P. McCurn, *Judge*).

This cause came on to be heard on the transcript of record from the United States District Court for the Northern District of New York and was argued by counsel.

ON CONSIDERATION WHEREOF, IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the judgment of the District Court be and it hereby is affirmed.

In connection with interstate transportation and sale of contaminated caviar from Lake Ontario, defendants Robert J. Gehl, George Jackson, Tempotech Industries, and Gehl Productions were indicted in September 1993 for: conspiracy to violate the Lacey Act, 16 U.S.C. §§ 3372(a)(2)(A) and 3373(d)(1)(B); substantive Lacey Act violations; and aiding and abetting such violations. Additionally, Gehl, Tempotech, and Gehl Productions ("the Gehl defendants") were indicted for conspiracy: to defraud the United States regarding currency transactions exceeding $100,000; to cause financial institutions to fail to file currency transaction reports; and to structure transactions at financial institutions. The Gehl defendants were also charged with related substantive financial crimes in violation of 31 U.S.C. § 5324(1) and (3), and with forfeiture.

In October 1994, a jury found the defendants guilty of the charged offenses. The evidence showed that over a period of more than eight years, Robert Gehl and employees of his companies, Tempotech and Gehl Productions, including George Jackson, had illegally processed and sold nearly one million pounds of salmon egg caviar in exchange for millions of dollars in cash, which they then structured to avoid detection. They carried out this scheme by taking caviar from Lake Ontario -- from which fish may not be sold, under New York law, except as bait -- shipping it to their plant in Michigan as bait, repackaging it there as Lake Michigan caviar, and then shipping it to New York for human consumption. The district court sentenced Gehl to 87 months imprisonment and fined him $250,000. It sentenced Jackson to 70 months imprisonment. Additionally, the court fined Tempotech $1,000,000, and Gehl Productions $1,200,000, and ordered Tempotech to forfeit $482,400.

On appeal, the defendants raise innumerable issues. We have reviewed them and find that none have merit.

The defendants challenge their Lacey Act convictions contending that the underlying state regulation upon which the convictions relied, 6 NYCRR § 37.1 ("Regulation 37.1"), is invalid. Among other things, they claim that Regulation 37.1, which prohibits the sale of Lake Ontario salmon eggs for human consumption, unconstitutionally burdens interstate commerce and is unenforceable because it was not properly promulgated under New York law. Putting aside such questions as whether collateral attack upon Regulation 37.1 is warranted in light of the defendants' failure to exhaust administrative remedies, *see McGee v. United States*, 402 U.S. 479 (1971); *United States v. General Nutrition Inc.*, 638 F. Supp. 556, 561-562 (W.D.N.Y. 1986), we disagree. As the district court carefully noted, *United States v. Gehl*, 852 F. Supp. 1150, 1153-60 (N.D.N.Y. 1994), the regulation furthers the legitimate purpose of minimizing health risks and is neither more burdensome than necessary, nor protectionist. It clearly is within the bounds of the commerce clause.

Additionally, the regulation was properly promulgated. Defendants are correct that New York's Environmental Conservation Law § 11-0325(1), which gave the Department of Environmental Conservation (DEC) the authority to promulgate Regulation 37.1, refers to fish and not to fish eggs. But we agree with the district court that the New York Legislature intended to give DEC broad authority to regulate fish and wildlife. We see no reason why the grant of authority to promulgate regulations pertaining to fish does not encompass authority to regulate fish eggs. We also reject the defendants' claim that there was no actual disease associated with the consumption of Lake Ontario salmon caviar; the evidence of chemical contamination at Lake Ontario was more than enough to justify state action to protect public health.

In challenging the indictment upon which they were convicted, the defendants argue, among other things, that the indictment's grouping of Lacey Act violations into five counts, one for each year from 1988 to 1992, was an impermissible aggregation of offenses; they contend that each violation required a separate count. We disagree. So long as the method of aggregating offenses is reasonable -- and here it was, given the ongoing multi-year nature of the scheme -- the government need not charge a defendant with the smallest "unit of prosecution" available. *See United States v. Tutino*, 883 F.2d 1125 (2d Cir. 1989), *cert. denied*, 493 U.S. 1081 (1990); *United States v. Margiotta*, 646 F.2d 729, 732-33 (2d Cir. 1981); *United States v. Provenzano*, 334 F. 2d 678, 684-685 (3d Cir.), *cert. denied*, 379 U.S. 947 (1964). Where the prosecution alleged years of illegal activity encompassing thousands of illegal transactions, the government was not required to burden the court and the jury with an indictment in many thousands of counts.

The defendants argue that they were prejudiced by the government's failure to disclose before trial incriminating oral statements they made to Wendy Gould, an FDA consumer safety specialist, while she was inspecting their facilities years before they were indicted. The government contends the statements made to Gould are not covered by Rule 16, be-

cause Gould was conducting an administrative inspection unrelated to this criminal case, and, therefore, was not a "government agent" as that term is used in the rule. *See United States v. Burns*, 15 F.3d 211, 214 (lst Cir. 1994). We need not resolve that dispute about the scope of Rule 16, as there was no abuse in the trial court's handling of the issue. The government learned of the oral statements just prior to trial, and the district court took proper steps to ensure that there would be no prejudice to the defendants. The court had Gould provide her entire testimony and submit to cross examination *in camera* and then it gave the defense a one week adjournment to prepare for her testimony in front of the jury. This adequately protected the defendants' interests. *See United States v. Giraldo*, 822 F.2d 205, 212 (2d Cir.), *cert. denied*, 493 U.S. 943 (1989).

The defendants also make numerous allegations of prosecutorial misconduct, none of which have merit. However, one issue raised by defendants calls for comment and "a note of caution to criminal prosecutors," *United States v. Reyes*, 18 F.3d 65, 72 (2d Cir. 1994). The government questioned its first witness, an official from the DEC, regarding "rumors" of the defendants' illegal activities that apparently led to the opening of the investigation. Counsel for the defense objected more than once to this line of questioning, noting that it was irrelevant hearsay that could be "extremely prejudicial." The district court allowed the testimony on the prosecutor's argument that the testimony was offered not for the truth of the matter, but as "background" to explain why the DEC undertook its investigation. Such testimony is not appropriate. There was no reason to tell the jury why the DEC undertook its investigation, and such information was all the more inappropriate when it included potentially prejudicial matter. The government relies on our discussion in *United States v. Harwood*, 998 F.2d 91, 99 (2d Cir.), *cert. denied*, 114 S.Ct. 456 (1993), as support for its position. The citation is surprising. For in *Harwood*, we held that the challenged testimony was "clearly inadmissible hearsay." Reversal of the conviction was avoided only because the incident was harmless. *Id.*

Similarly because the evidence below was overwhelming, the introduction of the prejudicial "background" evidence was undoubtedly harmless and does not call for reversal of well merited convictions. Prosecutors, however, should be mindful that in offering such prejudicial matter as "background," they are not only acting improperly but also are running an unreasonable risk of the reversal of the convictions they secure. *See Reyes*, 18 F.3d at 72; *United States v. Rivera*, 61 F.3d 131, 136 (2d Cir. 1995).

As noted above, the numerous other issues raised are without merit. We therefore affirm the judgments of conviction.

Hon. Pierre N. Leval, U.S.C.J.

Hon. Guido Calabresi, U.S.C.J.

Hon. Arthur Spatt, U.S.D.J.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

U.S. DISTRICT COURT
N.D. OF N.Y.
FILED
FEB 2 1995
AT ____O'CLOCK
_____M
GEORGE A. RAY, CLERK
SYRACUSE

UNITED STATES OF AMERICA

-v-

ROBERT J. GEHL; GEORGE JACKSON; TEMPOTECH INDUSTRIES, INC.; and GEHL PRODUCTIONS, INC.,

93-CR-300

Defendants.

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NEAL P. McCURN, S.J.

BACKGROUND

Familiarity with this prosecution is assumed. Therefore, only those facts necessary to decide the post-trial defense motions currently pending before the court will be set forth herein.

On October 7, 1994, after a trial of approximately two weeks, the jury found defendant Robert J. Gehl guilty of one count of conspiring to violate the Lacey Act, (count 1); guilty of five separate counts of actually violating the Lacey Act,[1] (counts 2-6); and guilty of conspiracy in connection with financial structuring (count 7). The jury also found defendant Gehl guilty of structuring and assisting in structuring as to certain transactions which are fully detailed in counts eight through twenty-four of the indictment. Finally, with respect to count 25 of the indictment--the forfeiture count--based upon the foregoing, the jury found that property, real or personal, of defendant Gehl was involved in each of the substantive structuring offenses charged in counts eight through twenty-four. Similarly, with respect to defendant Tempotech Industries, Inc., the jury found that defendant guilty on counts one through twenty-four of the indictment, as described above. The jury further found that Tempotech's property, real or personal, was also involved in each of the substantive structuring offenses (counts eight through twenty-four). Without distinguishing between Mr. Gehl and Tempotech, the jury found that property of those two defendants, totaling $482,400, was involved in the substantive structuring counts.

Insofar as the second corporate defendant is concerned, Gehl Productions, Inc., the jury found that defendant guilty of violating, as well as conspiring to violate, the Lacey Act (counts one through six). The jury also found Gehl Productions guilty of conspiracy to structure (count seven). However, the jury found Gehl Productions not guilty of the

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[1] In particular, the defendants were charged in those counts with violating sections 3372(a)(2)(A) and 3373(d)(1)(B) of the Lacey Act, which is found in Title 16 of the United States Code.

substantive structuring counts and the related forfeiture count (counts eight through twenty-five).[2] Finally, the jury found defendant George Jackson guilty of conspiring to violate and of violating the Lacey Act (counts one through six), the only counts of the indictment in which he was named.

The Gehl defendants timely filed three separate motions challenging this verdict. First, they move for judgment of acquittal pursuant to Fed. R. Crim. P. 29. Second, they move for a new trial pursuant to Fed. R. Crim. P. 33. Last, these same defendants move for an arrest of judgment as allowed under Fed. R. Crim. P. 34. Although the Gehl defendants are seeking post-verdict relief under three separate rules, with one exception, the basis for each of these motions is identical. More specifically, the Gehl defendants contend that they are entitled to those various forms of post-verdict relief for the following reasons: (1) prosecutorial misconduct; (2) prejudicial surplusage in the indictment; (3) the invalidity of the New York regulation underlying the Lacey Act counts; (4) claimed evidentiary errors; (5) count two violated the statute of limitations; (6) insufficiency of the evidence as to all of the substantive counts and the forfeiture count; (7) the indictment does not comply with the Lacey Act and it violates the Fifth and Sixth Amendments; and (8) the jury instructions were in error. In seeking an arrest of judgment, the Gehl defendants further maintain that such relief is mandated because the indictment improperly charged the substantive Lacey Act counts in the disjunctive. Defendant Jackson seeks the same post-verdict relief as do the Gehl defendants. Indeed, he specifically adopts all of the Gehl defendants' arguments in this regard. *See* Affidavit of George H. Lowe (Nov. 23, 1994) at ¶2.

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[2] Unless mentioned individually, for brevity, Robert J. Gehl, Tempotech Industries, Inc. and Gehl Productions, Ltd. will be referred to collectively throughout as the "Gehl defendants."

In these various motions, basically the defendants have left it to the court's discretion as to which argument should be made in connection with which Rule.[3] After reviewing Rules 29, 33, and 34, the court has determined that the only proper ground for defendants' Rule 29 motion for judgment of acquittal is the challenge to the sufficiency of the evidence.[4] As will be seen, however, the standards for determining the sufficiency of the evidence differ depending upon whether such a challenge is brought under Rule 29 or whether it is brought under Rule 33. Thus, because a challenge to the sufficiency of the evidence may also properly be brought as a Rule 33 motion for a new trial, the court will also address that argument in the context of a motion under that Rule. In addition, as will also become evident, the focus of a Rule 34 motion for arrest of judgment is relatively narrow, and the court has decided that the defendants' challenge to the validity of the New York regulation underlying the Lacey Act counts, the arguments that the indictment does not comply with the Lacey Act and that it is violative of the Fifth and Sixth Amendments, as well as the argument that the indictment improperly charges in the disjunctive, are more appropriately addressed under this Rule. The remaining arguments as to prosecutorial misconduct, prejudicial surplusage in the indictment, claimed evidentiary errors and claimed errors in the jury instructions, as well as the government's alleged failure to comply with Rule 16(a)(1)(A) in connection with the testimony of Wendy

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[3] *See* Memorandum of Law in Support of the Gehl Defendants' Motion for a New Trial ("New Trial Memorandum") at 15; Memorandum of Law in Support of the Gehl Defendants' Motion for Judgment of Acquittal ("Judgment of Acquittal Memorandum") at 9; and Memorandum of Law in Support of the Gehl Defendants' Motion for Arrest of Judgment at 7.

[4] 2 Charles A. Wright, *Federal Practice and Procedure* § 466 (1982) ("There is only one ground for a motion for a judgment of acquittal. This is that 'the evidence is insufficient to sustain a conviction' of one or more of the offenses charged in the indictment or information.") (footnote omitted); *See also United States v. Gjurashaj*, 706 F.2d 395, 399 (2d Cir. 1983) (The "very nature" of a Rule 29 motion for judgment of acquittal is "to question the sufficiency of the evidence to support a conviction.") (citations omitted).

Gould, a former Food and Drug Administration ("FDA") inspector, will all be considered as part of defendants' motion for a new trial under Rule 33.

DISCUSSION

I. Rule 29 Motion for Judgment of Acquittal

A. Sufficiency of the Evidence

In *United States v. Delanoy*, 93-CR-360, 1994 U.S. Dist. LEXIS 16200 (N.D.N.Y. Oct. 18, 1994), Chief Judge McAvoy of this district accurately set forth the standards governing a motion for judgment of acquittal brought pursuant to Fed. R. Crim. P. 29:

> It is well settled that the defendant advancing a Rule 29 motion has a very heavy burden. *United States v. Khan*, 787 F.2d 28, 33 (2d Cir. 1986). An acquittal may be granted pursuant to Rule 29 only if the evidence is insufficient to sustain a conviction. *United States v. Lopez*, 625 F.2d 889, 895 (9th Cir. 1980). The question is whether a reasonable mind might have fairly concluded the defendant was guilty beyond a reasonable doubt. *United States v. Artuso*, 618 F.2d 192, 195 (2d Cir. 1980). In determining this motion, the court must draw all reasonable inferences in favor of the prosecution, and must examine all the evidence in the light most favorable to the government with respect to each element of the offenses charged. *Id.* 'The relevant question is not whether this court believes that the evidence at trial established guilt beyond a reasonable doubt . . . rather the proper inquiry is whether, after viewing the evidence in the light most favorable to the prosecution, 'any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Khan*, 787 F.2d at 33-34, quoting, *Jackson*, 443 U.S. [at] 318-19 . . . . This framework assures that the reviewing court will not substitute its own judgment for that of the jury.

United States v. Gaviria, 805 F.2d 1108, 1116 (2d Cir. 1986).

Id. at *2- *4. Stated more succinctly, the "traditional standard" for challenging the sufficiency of evidence, in particular, is "whether 'the record evidence could reasonably support a finding of guilt beyond a reasonable doubt[.]'" *United States v. Leung*, 93-1784, 93-1880, 1994 U.S. App. LEXIS 33041, at * 20 (2d Cir. Nov. 21, 1994) (quoting *Jackson v. Virginia*, 443 U.S. 307, 318, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979)) (other citation omitted). Regardless of whether defendants' motion challenging the sufficiency of the evidence is viewed under the standards just outlined, or under the arguably more lenient standards of a motion for a new trial under Rule 33 set forth below, the court finds that the evidence in this case was sufficient to sustain the jury's verdict as to counts two through six and eight through twenty-five of the indictment.[5]

The defendants make three separate arguments as to the sufficiency of the evidence with respect to the Lacey Act convictions: (l) statute of limitations; (2) that the government is bound by the bill of particulars; and (3) that the government failed to prove the necessary elements of such convictions. The government did not specifically respond to any of these three arguments, leaving the court to speculate, at least in part,[6] as to what the government's position is now. In any event, the court will address these arguments *seriatim.*

The defendants accurately note that count two of the indictment alleges a single Lacey Act violation for the year

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[5] The defendants are challenging the sufficiency of the evidence as to every count of the indictment but two, and those are counts one and seven - the conspiracy counts.

[6] The court is familiar with these arguments because they are similar, although not identical given the procedural posture of the case, to those advanced by defendants at various times during this extended prosecution. This familiarity does not, however, excuse the government's failure to respond, particularly because these defense arguments directly address the government's proof, or lack thereof, at trial.

1988. They also correctly state, and the government does not dispute, that the five year statute of limitations applicable to the Lacey Act[7] expired for two-thirds of 1988 prior to the September 1, 1993 return of the indictment herein. From there, the defendants assert that "[b]ecause [at trial] the only evidence of 1988 caviar sales to New York were for sales occurring before September 1, 1988, Count two is barred by the statute of limitations." Judgment of Acquittal Memorandum at 3. Alternatively, stated somewhat differently, the defendants contend that they are entitled to a judgment of acquittal on count two "because there is insufficient evidence to prove a Lacey Act violation occurring between September 1, 1988 and December 1, [sic] 1988[,]" the only relevant time frame for 1988 given the expiration of the statute of limitations part way through that year. *See id.* The court disagrees. The testimony of Gregory Rappleye in particular established sales of Lake Ontario salmon eggs as caviar within New York State at least in October, 1988. *See* Tr. (Sept. 30, 1994) at 35-37. Consequently, the defendants' motion for judgment of acquittal on this ground is denied.

The defendants' second insufficiency of the evidence argument is that the government is bound by its Bill of Particulars, which supposedly listed the poundage and approximate value, by year, for caviar which the government claims defendants sold in violation of regulation 37.1. In this case, Rick Boeve, a government witness, was shown that bill of particulars, but he was unable to identify the source of the salmon eggs listed thereon for each of the years 1988-1992. Tr. (Sept. 29, 1994 - afternoon) at 47-51. Furthermore, it is the defendants' recollection of the trial that "[t]he government never offered any witness that could, or did know whether the salmon eggs listed on the Bill of Particulars originated in

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[7] *See United States v. Thomas*, 887 F.2d 1341, 1348-1349 (9th Cir. 1989) (Lacey Act, because it does not specifically define a limitations period therein, falls into that category of cases governed by the "catch-all" five year statute of limitations set forth in 18 U.S.C. § 3282).

Michigan or New York waters." Judgment of Acquittal Memorandum at 5.

To be sure, as just stated, Mr. Boeve was unable to identify the source of the salmon eggs referenced in the government's Bill of Particulars. Examining all of the evidence in a light most favorable to the government, as the court must,[8] however, in the court's opinion there was sufficient proof, even in the absence of testimony from Mr. Boeve, as to the source of the salmon eggs for each of the years charged in counts two-through six of the indictment. Therefore, the court denies defendants' motion for judgment of acquittal insofar as that motion is premised upon the government's failure to strictly conform its proof to the Bill of Particulars.

The defendants' final argument as to the sufficiency of the evidence pertaining to the substantive Lacey Act counts is not new to the court. As they did at trial, the defendants contend, basically, that the government improperly collapsed into one step what they claim are the two steps required to establish a Lacey Act violation. In making this argument, the defendants rely, as they did previously, upon *United States v. Carpenter*, 933 F.2d 748 (9th Cir. 1991). The court adheres to its prior ruling that *Carpenter* has no bearing on this case because it involved a prosecution under section 3372(a)(1) of the Lacey Act, and this case involves a prosecution under a different subsection of that Act - section 3372(a)(2)(A). In accordance with the plain language of 16 U.S.C. § 3372(a)(2)(A), there was ample proof in the record that the defendants sold Lake Ontario salmon eggs in interstate commerce in violation of New York State regulation 37.1. Consequently, the court denies defendants' motion for judgment of acquittal on this basis as well.

The Gehl defendants further maintain that there is insufficient evidence to sustain counts eight through twenty-four of the indictment - the so-called structuring counts. They

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[8] *See Delanoy, supra,* at *3 (citation omitted).

likewise assert that there was insufficient evidence to support count twenty-five - the forfeiture count. Considering all of the proof adduced at trial, the court finds that the Gehl defendants have failed to meet their "very heavy burden"[9] of showing that they are entitled to a judgment of acquittal on any of these counts. There is more than sufficient evidence in the record to sustain these convictions. Moreover, were the court to grant such motion, the result would be that the court would be substituting its judgment for that of the jury, and that is strictly prohibited. *See Delanoy, supra*, at *4 (citation omitted). Thus, in light of the foregoing, the court hereby denies, in all respects, defendants' - motion for a judgment of acquittal under Fed. R. Crim. P. 29.

II. Rule 33 Motion for New Trial

A. Sufficiency of the Evidence

In its discretion, the court under Fed. R. Crim. P. 33 "**may** grant a new trial . . . if required in the interest of justice." Fed. R. Crim. P. 33 (emphasis added). "Under Rule 33, the court has broader powers than it does in determining a motion for acquittal and may consider the credibility of witnesses and may weigh the import of evidence." *Delanoy, supra*, 1994 U.S. Dist. LEXIS 16200, at *5 (citing *United States v. Valentine*, 644 F.Supp. 818, 821 (S.D.N.Y. 1986)). Even so, generally motions for a new trial are ""not favored and should be granted only with great caution."" *Id.* (quoting Valentine, 644 F.Supp. at 821) (quoting in turn *United States v. Lombardozzi*, 343 F.2d 127, 128 (2d Cir. 1965)).[10] Despite the court's broader powers under this Rule, it is not convinced that any of the defendants are entitled to a new trial hereunder based upon a claimed insufficiency of the evidence. Therefore, the

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[9] *See id.* at *2.

[10] The authority to grant a new trial based upon the "interest of justice" should "only [be] exercised, . . . , in the most extraordinary circumstances." *United States v. Locascio*, 6 F.3d 924, 949 (2d Cir. 1993) (citation omitted).

court hereby denies defendants' motion for a new trial insofar as it is based upon a claimed insufficiency.

B. Prosecutorial Misconduct

The Gehl defendants vehemently contend that AUSA Benedict engaged in prosecutorial misconduct in several ways. First, they assert that he improperly referred to the legislative history of 6 N.Y.C.R.R. § 37.1 ("the regulation") - the regulation which formed the basis for the Lacey Act counts of this prosecution - and that such references were "inflammatory and prejudicial." New Trial Memorandum at 1. Second, the Gehl defendants contend that in his closing argument AUSA Benedict improperly referred to the residents of New York as victims of contamination. Third, they argue that Benedict made a number of improper comments in his closing argument, including several remarks about the defendants' failure to testify or to call witnesses, and the defendants believe this last comment in particular was intentional. Fourth, the defendants contend that various other comments made by the prosecutor during the course of he trial are part of what they believe to be a "continuous pattern of intentional misconduct" by the prosecutor such that the court has no choice but to grant this motion for a new trial. *Id.* at 9.

1. Summation

Before considering these claimed areas of prosecutorial misconduct, because the defendants focus primarily upon AUSA Benedict's closing argument, it should be noted that "[a] prosecutor's statements during summation, if improper, will result in a denial of due process rights **only if, in the context of the entire summation**, they cause the defendant **substantial prejudice**." *United States v. Rivera,* 22 F.3d 430, 437 (2d Cir. 1994) (and cases cited therein) (emphasis added). In *Rivera,* the Second Circuit reiterated that "[t]he determination of whether there was such prejudice depends largely on an analysis of the severity of the misconduct, the curative measures taken by the court, and the certainty of conviction absent the misconduct." *Id.* (citations omitted). It is against this

standard which the court must examine the claimed improprieties in AUSA Benedict's summation.

a. Legislative History

The defendants complain in several ways about the prosecutor's references to the purpose underlying the promulgation of section 37.1 At this point, however, the court will focus only on the prosecutor's closing argument.[11] After reviewing the transcript of that argument, including rebuttal, it does not appear to the court that the prosecutor commented on the intent behind section 37.1. Interestingly, the defendants do not cite to any particular part of the transcript wherein they claim such references might be found. Thus, obviously, there can be no finding of prosecutorial misconduct on this basis.

Even if it could be inferred that in his closing the prosecutor in some way commented upon the purpose of section 37.1, the court still would be forced to conclude that no prosecutorial misconduct resulted from such comments. First of all, besides the fact that none of the three cases relied upon by defendants on this issue arose in the Second Circuit, those

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[11] It is not clear whether the defendants contend that the purported references in the indictment (which was published to the jury) to the regulation's purpose, as well as such references in the jury instructions, in and of themselves, rise to the level of prosecutorial misconduct, or whether the defendants are arguing that those acts are just part of an ongoing pattern of misconduct engaged in by the prosecutor in this case. Presumably the defendants are making both arguments.

As the parties are well aware, this is not the first time that the issue of the propriety of mentioning the purpose behind section 37.1 has arisen in this case. In any event, the court remains convinced that insofar as the indictment can be construed as making such references, it did not substantially prejudice defendants so as to form an independent basis for a claim of prosecutorial misconduct. Similarly, the fact that the government requested a jury charge in connection with the purpose of section 37.1, which the court eventually gave, also does not, standing alone, amount to prosecutorial misconduct. Finally, the court will consider later in this decision whether the matters just discussed, along with the alleged improper comments in the AUSA's summation are indicative in this case of a continuing pattern of prosecutorial misconduct, as the defendants suggest.

cases are also each readily distinguishable. *United States v. Leon,* 534 F.2d 667 (6th Cir. 1976), involved a situation where the prosecutor commented extensively on the purposes of the federal gambling statute, and he did so even after the trial court had sustained an objection to such comments. *See id.* at 679-681. Likewise, the Seventh Circuit in *United States v. Fullmer,* 457 F.2d 447 (7th Cir. 1972), reversed a licensed gun dealer's conviction where the prosecutor commented that when it passed the Gun Control Act of 1968, Congress was concerned, among other things, about the use of ammunition and guns "for sniping and creating disturbances, and so forth." *Id.* at 449. In discussing the prosecutor's remarks in *Fullmer,* the Ninth Circuit accurately pointed out that those remarks "did not strongly relate to the defendant's conduct." *United States v. Ray,* 731 F.2d 1361, 1368 (9th Cir. 1984). Furthermore, "[i]t is a large leap from selling guns to sniper attacks." *Id.* The relevance of the third case relied upon defendants, *United States v. Norton,* 639 F.2d 427 (8th Cir. 1981), is significantly undermined because, as did *Fullmer,* that case too involved a prosecutor "testify[ing]" in closing argument about the purpose of the Gun Control Act - a statute not at issue in this case. *Id.* at 429.

Here, even if the prosecutor in his closing statement did refer to the underlying purpose of section 37.1 (but, again, the court does not read his statement that way), then such references were obviously not extensive; nor were they an integral part of the prosecution's strategy. *See Ray,* 731 F.2d at 1369. Moreover, as already explained, because there is more than sufficient evidence to support these convictions, and because this claimed misconduct, if it occurred, is far from severe, the court cannot find "substantial prejudice" such as would result in a denial of defendants' due process rights. *See United States v. McCaghren,* 666 F.2d 1227, 1232 (8th Cir. 1981).

b. Contamination

The defendants' second complaint about the prosecutor's summation is that, in their words, he referred "to the residents of New York as victims of contamination[.]" New Trial

Memorandum at 4. The defendants then assert that such comment was improper because "[t]here was no evidence introduced to support this argument and the sole purpose was to inflame the jury about poisons in the New York food supply." *Id.* at 5. The government did not bother to respond to this argument in its opposing memorandum of law.

For several reasons, the court finds that these remarks do not rise to the level of prosecutorial misconduct. First, in their zeal, in the court's opinion, the defendants have somewhat overstated what the prosecutor said in this regard. The prosecutor did specifically ask the jury to "remember one thing: this is not a matter without victims." Tr. (Oct. 6, 1994) at 74. He then went on to mention that the defendants knew that these fish eggs were "contaminated;" and he also mentioned that because the people who bought it "had no idea what they were buying[,]" they could not "exercise an informed decision" in deciding whether or not to eat such fish eggs. *Id.* at 74 and 75. In the court's view, however, all of this is slightly different than if the prosecutor had made a blanket assertion that as a direct result of he defendants' conduct, the residents of New York were "victims of contamination." Even though the court disagrees with the defendants' characterization of these remarks by the prosecutor, what is more important at this juncture is that the defendants did not object to those comments at the time. Because of that, at least in this Circuit, "the statement[s] will not be deemed ground for reversal unless it amounts to a 'flagrant abuse[;]'"[12] and obviously the prosecutor's passing references, as just described, certainly do not amount to a "flagrant abuse."

Lastly, the two First Circuit cases cited by defendants to support their argument stand in sharp contrast to the present case and thus do not persuade the court, in the slightest, that the complained of statements by the AUSA constitute

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[12] *Rivera*, 22 F.3d at 437 (quoting *United States v. Ortiz*, 857 F.2d 900, 904 (2d Cir. 1988), *cert. denied*, 489 U.S. 1070, 109 S.Ct. 1352, 103 L.Ed.2d 820 (1989)) (other citations omitted).

prosecutorial misconduct. Both *Arieta-Agressot v. United States*, 3 F.3d 525 (1st Cir. 1993), and *United Sates v. Moreno*, 991 F.2d 943 (1st Cir.), *cert. denied*, __ U.S. __, 114 S.Ct. 457, 126 L.Ed.2d 389 (1993), were cases in which the prosecutors made highly inflammatory comments, specifically designed to play upon the jury's emotions. For example, in *Moreno*, the prosecutor told the jury in his opening statement that the evidence would show that the community had been "plagued by . . ., senseless violence, shootings and killings[,]" but no such evidence was ever presented. 991 F.2d at 947. In addition to the fact that the prosecutor's comments in *Moreno* were far more inflammatory and thus employed to arouse the passion of the jury and nothing more, the defendants herein have conveniently overlooked the fact that on appeal the First Circuit found that the trial court's "powerful and contemporaneous instruction was adequate to dispel any prejudice caused by the prosecutor's remarks." *Id.* at 948. Consequently, the Circuit Court found that "[t]he district court acted within its discretion . . . concluding that the prosecutor's misstatement did not so poison the well as to require a new trial." *Id.* at 949 (internal quotation omitted) (citation omitted).

In a similar vein, as the First Circuit describes it, throughout his closing argument, the government attorney in *Arieta-Agressot* "urged the jury to view this case as a battle in the war against drugs, and the defendants as enemy soldiers." 3 F.3d at 527[13] Plainly, the prosecutor's remarks in this case as to contamination fall far short of the rhetoric employed by the government attorney in *Arieta*, and thus because of that important factual distinction, the court does not read *Arieta* as requiring a new trial in this case based upon what could, at

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[13] What follows is a representative sampling of the prosecutor's patently improper comments in that case: "Nobody has the right to poison the people and poison our children." 3 F.3d at 527. "Because the defendants are not soldiers in the army of good. They are soldiers in the army of evil, in the army which only purpose [sic] is to poison, to disrupt, to corrupt." *Id.*

most, be described as an "incidental embellishment." *See id.* at 530 (internal quotation and citation omitted).

c. Failure to Testify or Call Witnesses

As should be apparent by now, the court is easily satisfied that no prosecutorial misconduct occurred as a result of either the prosecutor's supposed references in his closing to the purpose of section 37.1 or his references therein to victims and contamination. More troublesome, however, is the defendants' argument, particularly as to defendant George Jackson, that AUSA Benedict improperly remarked in his closing as to the defendants' failure to testify or call witnesses. Following is the a statement by AUSA Benedict which forms the primary focus of this aspect of the defense motion:

> Now, ladies and gentlemen, the judge is going to tell you in this case that the defendants were under no obligation whatsoever to call any witnesses and that, of course, is true. The Government has the burden of proof and we gladly assume that burden.
>
> But that doesn't mean that they couldn't call witnesses if they wanted to. Don't think for one second that if there wasn't -- if there was someone out there who could have come in and said it ain't so, that they couldn't have called them in a second and --

Tr. (Oct. 6, 1994) at 84-85. At that point the prosecutor was interrupted by the objection of both defense counsel. *Id.* at 85. The court sustained the objection and counsel for the Gehl defendants requested a sidebar conference, and both defense counsel then moved for a mistrial. *Id.* at 85-86. The court instructed AUSA Benedict "not to go into that any more." *Id.* at 87. After indicating that it would give a curative instruction, the court stated, "I think it's improper what you are doing. I don't think it rises to the stature so prejudicial it would call for a mistrial at this point however." *Id.* Almost immediately thereafter the court gave the following curative instruction:

> Ladies and gentlemen, I will instruct you -- I am going to instruct you that the defendants here have

> an absolute right not to take the stand and testify themselves. They also have an absolute right not to put in any proof, to make the government meet its burden of proof beyond a reasonable doubt, by the government's evidence of their guilt.
>
> I want you to keep that in mind. They have no obligation to put on any witnesses.

Id. at 87-88. The prosecutor then continued his closing statement.

Consistent with the court's earlier curative instruction, when charging the jury, the court gave the following instruction with respect to the fact that the defendants did not testify:

> A defendant in a criminal case has an absolute right under our Constitution not to testify.
>
> The fact that these defendants did not testify must not be discussed or considered by the jury in any way when deliberating and in arriving at your verdict. No inference of any kind may be drawn from the fact that a defendant decided to exercise his privilege under the Constitution and did not testify.

Tr. (Oct. 7, 1994) at 26-27. The court further explicitly instructed the jury as follows with respect to the burden of proof:

> As a result of the defendant's plea of not guilty the burden is on the prosecution to prove guilt beyond a reasonable doubt.
>
> This burden never shifts to the defendant for the simple reason that the law never imposes upon the defendant in a
>
> > criminal case the burden or duty of calling any witness or producing any evidence.

> The law presumes the defendant to be innocent of the charge against him. Thus, the defendant, although accused, begins the trial with a clean slate, with no evidence against him.
>
> This presumption of innocence alone is sufficient to acquit the defendant unless you, as jurors, are satisfied beyond a reasonable doubt of his guilt, after a careful and impartial consideration of all of the evidence in this case.

Id. at 28.

In addition to the foregoing, the defendants highlight several other statements in the prosecutor's summation which also form the basis for their claim of prosecutorial misconduct. In particular, they note the AUSA's misstatement where he said, "Gehl testified," when in fact he did not. Tr. (Oct. 6, 1994) at 108. After counsel for the Gehl defendants objected, the AUSA said that he did not mean to say that Mr. Gehl had testified; he meant to say that "Gehl said to Ms. Gould[.]" *Id.* The defendants also contend that the prosecutor improperly remarked that "[w]hen you don't have strong evidence," you have to make certain arguments to confuse the jury. *Id.* at 118. The defendants point to two other comments in the prosecutor's summation which they believe were improper. The first of these is AUSA Benedict's statement in rebuttal: "[I] don't know what the attorney [for the Gehl defendants] was trying to accomplish with his letter to the FDA[;]" he then went on to say, in connection with that letter, that "there is nothing on it and not a shred of evidence that that was ever shown to George Jackson." *Id.* at 230. Lastly, the defendants assert that the prosecutor's comment in closing that this was "a very important case," to which they timely objected, was also highly improper.[14] *Id.* at 240.

Taking all of these comments together, the defendants strenuously maintain that their Fifth Amendment right to

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[14] The court sustained that objection.

remain silent and not call witnesses was violated by the same. They further argue that those collective remarks by the prosecutor impermissibly shifted the burden of proof. The court will separately address each of these arguments.

"'[I]t is axiomatic that the Government may not comment on a defendant's failure to testify at trial[.]'" *United States v. Pitre*, 960 F.2d 1112, 1124 (2d Cir. 1992) (quoting *United States v. McDermott*, 918 F.2d 319, 327 (2d Cir. 1990), *cert. denied*, 500 U.S. 904, 111 S.Ct. 1681, 114 L.Ed.2d 76 (1991)). Nor may the government "suggest that the defendant has any burden of proof or any obligation to adduce any evidence whatever[.]" *United States v. Parker*, 903 F.2d 91, 98 (2d Cir., *cert. denied*, 498 U.S. 872, 111 S.Ct. 196, 112 L.Ed.2d 158 (1990). The government may, however, "comment on defendant's failure to call witnesses to contradict the factual character of the Government's case, as well as on defendant's failure to support his own factual theories with witnesses." *McDermott*, 918 F.2d at 327 (citations omitted). The Second Circuit has repeatedly recognized, though, that "[w]hen the evidence that the defendant has not adduced is in the control of the defendant alone or where the jury would naturally and necessarily interpret the Government's summation as a comment on the defendant's failure to testify that the Government's comments run afoul of the Fifth Amendment." *Id.* (citing *United States v. Bubar*, 567 F.2d 192, 199 (2d Cir.), *cert. denied*, 434 U.S. 872, 98 S.Ct. 217, 54 L.Ed.2d 151 (1977)). Importantly, as alluded to earlier, "[t]o obtain a reversal of a conviction on the ground that the prosecutor has crossed the boundary between permissible and impermissible argument, a defendant must show that the improper argument caused him substantial prejudice." *Parker*, 903 F.2d at 98 (citations omitted). However, "[e]ven where the prosecutor's argument was clearly impermissible, [the Second Circuit] ha[s] been reluctant to reverse where the transgression was isolated, the trial court took swift and clear steps to correct the implication of the argument, and the evidence against the defendant was strong." *See id.* (citation omitted). As will be explained, that is precisely the situation presented here, at least with respect to the Gehl defendants.

Preliminarily, before examining the individual statements which form the basis for the prosecutorial misconduct claim, the court will briefly address defendants' argument that the AUSA's remark about the defendant's failure to call witnesses was intentional. As the defendants are well aware, the Second Circuit plainly stated in *Pitre,* as it has before, that "[t]o reverse a conviction for improper commentary on the right to remain silent, [it] must find that the comment was 'manifestly intended **or** [was] of such a character that the jury would naturally and necessarily take it to be a comment on the failure of the accused to testify." *Pitre,* 960 F.2d at 1124 (internal quotation omitted) (citation omitted) (emphasis added). Under the *Pitre* standard, the court is forced to conclude that this particular remark by AUSA Benedict was "manifestly intended." The court bases this conclusion upon two factors. The first is that the remark was made quite early on in the government's summation, not in the government's rebuttal. It is not as though the government was prompted to respond to any defense closing argument.

Second, the court agrees with defendant Jackson that based upon the prosecutor's argument at the sidebar, together with the fact that the next day he provided copies of two relevant Second Circuit decisions to the Court,[15] there is little doubt that AUSA Benedict was fully aware of the boundaries for making such remarks in closing. The court is unable to find, however, viewing the assertedly prejudicial remark in context, and taking into account the prompt curative instruction given right after that remark, as well as the court's later instruction to the jury that the defendants have a right not to call witnesses or testify, that the jury would "naturally and necessarily" take such remark to be a comment on the failure of the accused to testify, at least as to the Gehl defendants. *See id.* But, for reasons which will be more clear as the court discusses each of the other remarks which are part of the

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[15] *United States v. Bautista,* 23 F.3d 726 (2d Cir.), *cert. denied,* ___ U.S. ___, 115 S.Ct. 174, 130 L.Ed.2d 110 (1994); and *United States v. Gotchis,* 803 F.2d 74 (2d Cir. 1986).

defendants' prosecutorial misconduct claim, the court cannot find that AUSA Benedict engaged in a "continuous pattern of misconduct" during the trial. New Trial Memorandum at 8.

It is not difficult to decide whether certain of the prosecutor's statements in closing amounted to prosecutorial misconduct in terms of the Gehl defendants. The short answer is that they did not; the Gehl defendants, quite simply, are unable to demonstrate to the court's satisfaction the "substantial prejudice" necessary to prevail on a claim of prosecutorial misconduct. Insofar as the first component of substantial prejudice is concerned - the seriousness of the misconduct - overall, the court does not find that the alleged misconduct was that serious. It is true that in summation the prosecutor remarked that the defendants could have "call[ed] witnesses if they wanted to." Tr. (Oct. 6, 1994) at 85. That remark was prefaced, however, by the prosecutor's statement that "the judge is going to tell you . . . that the defendants were under no obligation whatsoever to call any witnesses and that, of course, is true." *Id.* at 84-85. In addition, the prosecutor unequivocally reminded the jury that it "has the burden of proof and we gladly assume that burden[,]" before mentioning that the defendants could have called witnesses had they chosen to do so. *Id.* at 85. And, the court did, in fact, instruct the jury not once, but twice, that the defendants had no obligation whatsoever to call any witnesses or to testify and that the burden of proof, at all times, remains on the government. More specifically, immediately following these remarks by the prosecutor the court gave a curative instruction, which is fully set forth herein.[16]

At this point, it is worth mentioning that in *Parker, supra,* the Second Circuit declined to find serious misconduct in the government's summation, even though the prosecutor **repeatedly** questioned why the defendant had not called his sister to testify. 903 F.2d at 99. The Court reasoned, *inter alia,* "the prosecutor had begun this portion of the argument by stating that Parker had no obligation to call any witness and that the

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[16] *See* discussion, *supra,* at 17.

burden rested solely on the government to prove his guilt beyond a reasonable doubt." *Id.* If the prosecutor's repeated question of a defendant's failure not to call a particular witness in *Parker* was not a "serious misconduct," then certainly the prosecutor's similar isolated reference, surrounded as it was by an accurate statement of the burden of proof and a statement that the defendants were not required to call any witnesses, cannot be considered serious misconduct of the type necessary to sustain a finding of substantial prejudice. *See United States v. Rosa,* 11 F.3d 315, 342 (2d Cir.), ___ U.S. ___, 114 S.Ct. 1565, 128 L.Ed.2d 211 (1994) (prosecutor's question in rebuttal as to why a defendant had not called a particular witness was proper where he "was careful not to suggest that [the defendant] had any burden of proof or any obligation to adduce any evidence)."

Assuming *arguendo* that the prosecutor's comments in summation regarding defendants' failure to call witnesses could somehow be found to rise to the level of "serious misconduct," the court would still be unable to find the requisite substantial prejudice as to the Gehl defendants. That is so because the court gave a curative instruction directly after that remark, and the court also gave explicit jury instructions later that the defendants had an absolute right not to testify and that the burden of proof remained, at all times, on the government. Therefore, even if the necessary serious misconduct were shown, the court firmly believes that it took the necessary measures to cure the same. Third, as to the certainty of convictions absent the alleged improper statements the proof as already discussed in connection with defendants' challenge to the sufficiency of the evidence leads the court to conclude that at least with respect to the Gehl defendants, the jury would have found them guilty of the charges which they did, even if the prosecutor had not mentioned that the defendants could have called witnesses "if they wanted to." Tr. (Oct. 6, 1994) at 85.

The defendants make the bald assertion that the prosecutor's statements, particularly as to the defendants' failure to call witnesses, amounted to impermissible burden shifting.

See New Trial Memorandum at 7. The court disagrees. Rejecting a similar burden-shifting argument, the Second Circuit in *Gotchis, supra,* soundly reasoned, in words which could have been written with this case in mind:

> No presumptions - [g]iven the common definition of presume as to suppose to be true without proof, - were ever presented to [the jury.] While it might have been preferable for the prosecutor to have restricted herself to emphasizing the lack of evidence tending to disprove her case, rather than inviting the jury to speculate about specified witnesses the defendant might have called, we do not think the latter comments could fairly be interpreted to mean that the defendant had any obligation to produce these witnesses.

803 F.2d at 80-81 (internal quotations and citations omitted).

More recently, the Second Circuit in *Bautista, supra,* again rejected an argument of impermissible burden shifting. In that case the defendant argued that the following statement by the prosecutor improperly shifted the burden of proof to him as to the elements of the offense:

> The defense does not have a burden of proving anything to you but when they do make an argument to you . . . you don't have to accept it. **At that point, they are obligated to come forward with evidence.**

23 F.3d at 733 (emphasis added). Acknowledging that this statement was "inapt," and cautioning that "prosecutors should avoid statements suggesting that the defense 'is obligated' at any time 'to come forward with evidence,'" the Court held, nonetheless, "when considered in context [this statement] would not have been understood by a reasonable jury as anything more than an argument that the jury need not believe uncorroborated defense theories." *Id.* (footnote omitted). Similarly, in the present case, when the prosecutor's remark is read in context, the court does not believe that a

reasonable jury would have construed that comment as "naturally and necessarily" commenting on the defendants' failure to testify, especially the Gehl defendants.

As previously mentioned, there are a few more remarks made by the prosecutor during his closing which the defendants assert support a finding of prosecutorial misconduct, and the court will briefly address each of those.[17] The AUSA's reference to Mr. Gehl testifying, when he did not, rather than saying, as the AUSA eventually did that Gehl "said to Ms. Gould," strikes the court as nothing more than an innocent slip of the tongue. Ironically, had defense counsel not highlighted this remark by objecting to it not once, but twice,[18] the court doubts whether the jury would have even noticed it. Moreover, in any event, given the government's fairly lengthy closing argument, it is highly unlikely that that misstatement remained in the jury's collective conscience during deliberations.

The defendants also take issue, as earlier noted, with the prosecutor's comment that "[w]hen you don't have strong evidence, you have got to make any argument you can[,]" and the mention of defense counsel's confusing the jury. Tr. (Oct. 6, 1994) at 118. The defendants seem to be contending that that comment, in and of itself, amounts to prosecutorial misconduct, warranting a new trial. *See* New Trial Memorandum at 9. To support that position, the defendants rely solely upon *United States v. Boldt,* 929 F.2d 35 (1st Cir. 1991). The prosecutor in *Boldt* stated in closing argument that "'it's a favorite defense tactic to try to get you to focus on unnecessary facts or to get you emotionally wrapped up with the

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[17] Because they did not address it when analyzing the issue of prosecutorial misconduct, seemingly, the defendants do not believe that the prosecutor's reference in rebuttal to defense counsel's FDA letter is a significant part of that argument. Thus, because the defendants themselves do not deem that comment worthy of legal analysis, neither does the court.

[18] Tr. (Oct. 6, 1994) at 108.

defendant.'" *Id.* at 40. While the First Circuit did find that that statement was "clearly improper," the defendants in this case conveniently ignore the fact that the First Circuit declined to find that such impropriety required a new trial. *Id.* A new trial was not necessary there, reasoned the First Circuit, because the comment was "fairly isolated," and the trial court gave a "strong and thorough" curative instruction, besides sustaining an immediate defense objection. *Id.* at 41.

In the present case, unlike *Boldt,* the defendants did not immediately object to this comment by the prosecutor which they now claim was objectionable. Presumably that was a tactical decision on the part of counsel to avoid highlighting to the jury what defense counsel perceived to be a prejudicial remark. Regardless, the court, obviously, did not give a curative instruction because none was requested and no objection was made. Without deciding whether defendants may have waived their right to object to this particular comment in the prosecution's closing, the court finds that, as in *Boldt,* this comment was "fairly isolated." Furthermore, in the court's opinion, the prosecutor's comment here was not nearly as prejudicial as that in *Boldt,* and thus the serious misconduct element of substantial prejudice is absent. In addition, as already discussed, in light of the overwhelming evidence of guilt with respect to the Gehl defendants., the certainty of conviction here was great - whether or not the prosecutor made this fleeting reference to the defendants lack of strong evidence as justification for making arguments which confuse the jury.

Finally, to support their view that the prosecutor's reference in closing to this as a "very important case"[19] was improper and thus requires a new trial, the defendants cite to *United States v. Cole,* 755 F.2d 748 (11th Cir. 1985). In *Cole* the prosecutor made almost the exact same comment as did AUSA Benedict. The *Cole* Court did agree that such comment was improper, but it found that "these comments did not

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[19] Tr. (Oct. 6, 1994) at 240.

prejudicially affect any of the appellants' substantive rights." *Id.* at 769 (citations omitted). In reaching that conclusion, the Court stressed the immediate curative instruction; and it also noted that any resulting error from such comments was "harmless." *Id.* (citation omitted). Even though this court did not give a curative instruction *per se,* it did sustain the defendants' immediate objection to this comment. Tr. (Oct. 6, 1994) at 240. In so doing, in an effort to diminish the prosecutor's mention of the importance of this case, the court stated, "Every case is important." *Id.* Furthermore, as with nearly all of the prosecutor's remarks in closing,[20] which the defendants complain of by this motion, when viewed, as they must be, "in the context of the entire summation,"[21] the court cannot find, insofar as the Gehl defendants are concerned, that AUSA Benedict engaged in prosecutorial misconduct while giving his summation.

By now it should be obvious that there has been one significant omission from the court's analysis and that is the issue of whether the prosecutor's statement that the defendants "could [have] call[ed] witnesses if they wanted to"[22] amounts to prosecutorial misconduct in terms of defendant Jackson.[23] That omission was deliberate. In all candor, given the nature of the proof against Jackson, the court finds this issue troublesome, far more so than in the case of the Gehl defendants.

In contrast to the Gehl defendants, the prosecution case against defendant Jackson rested heavily upon the strength of one witness, Wendy Gould, a former FDA inspector. Mr.

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[20] The only exception being the prosecutor's rhetorical query in closing as to why defendants did not call any witnesses.

[21] *Rivera, supra,* 22 F.3d at 437 (citations omitted).

[22] Tr. (Oct. 6, 1994) at 85.

[23] To clarify, for reasons already discussed in connection with the Gehl defendants, this comment aside, the court does not find that any of the prosecutor's other closing remarks amounted to prosecutorial misconduct with respect to defendant Jackson.

Jackson's defense was that he did not know that the sale of Lake Ontario salmon eggs for human consumption was illegal. Essentially, Ms. Gould testified that in a conversation between she and Mr. Jackson, he acknowledged that he was aware of New York's regulatory ban on such sales. So, argues defendant Jackson, he was the only witness who could have possibly contradicted Ms. Gould's testimony. Thus, when the prosecutor questioned in closing why defendants did not call any witnesses, defendant Jackson contends that that query was clearly improper because the only possible inference which the jury could draw is that "Gould must be telling the truth," because otherwise Jackson would have taken the stand and contradicted her testimony. Defendant George Jackson's Reply to Government's Opposition to Post-Trial Motions ("Jackson Reply") at 3. Jackson further asserts that because of the "closeness" of the government's case against him, "the prosecutor's improper statements cannot be viewed as harmless." *Id.* at 4.

To support this argument, defendant Jackson relies solely upon *United States v. Hardy*, 37 F.3d 753 (1st Cir. 1994), wherein the First Circuit found that the prosecutor did improperly comment upon the defendant's failure to take the stand and testify. In *Hardy*, the prosecutor stated that the defendants are "still running and hiding today." *Id.* at 757. "The time has come for them to stop running and stop hiding." *Id.* When the defendant objected and requested a limiting instruction, the prosecutor explained to the court that he was "just drawing an analogy between their running and hiding on that night and the Government's burden of proving guilt beyond a reasonable doubt." *Id.* The district court was not satisfied with that response and instructed the jury to disregard that remark, but it refused to grant the defendants' motion for a mistrial.

On appeal, the First Circuit held that the prosecutor's comment had violated the Fifth Amendment because "[t]he natural and necessary implication of that prosecutor's remark was . . . that the defendants were running from the evidence presented against them, and hiding behind their right to

silence during the trial." *Id.* at 758. The *Hardy* Court next considered whether a new trial was required, and for several reasons, found that it was. The first justification for ordering a new trial was that the prosecutor's remark "[w]as manifestly intended or was of such character that the jury would naturally and necessarily take it to be a comment on the failure of the accused to testify." *Id.* at 757 (internal quotation and citation omitted).[24] The Court also believed that, "in a sense," those remarks were "deliberate." *Id.* at 758. A second factor which weighed in favor of granting a new trial was that the prosecutor's remarks were "not an isolated instance of misconduct[;]." the prosecutor there had made a number of other disturbing remarks over the course of the trial. *Id.* (citation omitted). The Court further reasoned that even though a limiting instruction was given,[25] "[a]n improper comment that may seem insignificant where the evidence is overwhelming can assume a very different aspect in a close case. This is such a close case." *Id.*[26] Fourth, the Court pointed out that "the strength of the evidence proffered against Hardy was not overwhelming." *Id.* Of particular import is that it does not appear that any one of those factors alone would necessarily have required a new trial. Rather, it seems that it was the combination of these factors which the *Hardy* Court found warranted a new trial.

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[24] Even though *Hardy* is a First Circuit case, as the Second Circuit recognized in *United States ex rel. Leak v. Follette*, 418 F.2d 1266 (2d Cir. 1969), *cert. denied*, 397 U.S. 1050, 90 S.Ct. 1388 25 L.Ed.2d 665 (1970), the just quoted language "has become rather a favorite of many courts, including this one[.]" *Id.* at 1269; *see, e.g., McDermott, supra*, 918 F.2d at 327.

[25] In charging the jury, the trial court also "state[d] generally that the government had the burden of proof, that the defendants' had a constitutional right not to testify, and that the jury should not draw any negative inferences from the exercise of that right." *Hardy*, 37 F.3d at 757, n. 3.

[26] The court observes that defendant Jackson, without discussing any other aspect of *Hardy*, relies upon this quote and urges that his case too is a "close" one. *See* Jackson Reply at 4.

Aside from the fact that its precedential value is somewhat limited because it did not arise in the Second Circuit, *Hardy* is distinguishable from this case. Therefore, this court does not believe that the Court's reasoning therein entitles defendant Jackson to a new trial. The first basis for distinguishing *Hardy* is that AUSA Benedict's remark was not made while he was specifically referring to defendant Jackson; nor was he even discussing Ms. Gould's testimony at the time. In fact, AUSA Benedict was not even referring to the Lacey Act violations at that point in this summation.[27] Therefore, in contrast to *Hardy*, this court is not convinced that the jury would "naturally and necessarily [have] interpret[ed] the Government's summation as a comment on the defendant's failure to testify. . . ." *See McDermott, supra*, 918 F.2d at 327 (citation omitted). As already discussed, though, as in *Hardy*, the court does believe that "in a sense," AUSA Benedict's comment about the defendants not calling any witnesses was deliberate.[28] But, assuming for the moment that this particular comment by AUSA Benedict did amount to misconduct, as should be apparent from the court's earlier discussion, his other comments in closing and elsewhere did not constitute misconduct; and so, unlike *Hardy*, at the very most, this was an isolated instance of prosecutorial misconduct. Furthermore, in contrast to the *Hardy* jury, the court does not believe that this jury "was exposed to a number of emotional and prejudicial arguments which potentially interfered with its ability to appraise the evidence objectively and dispassionately." *See Hardy*, 37 F.2d at 759.

The last element analyzed by the *Hardy* Court - the strength of the proof - is a factor which, arguably, could tip either way. Certainly the court is unable to describe the proof against defendant Jackson as overwhelming. The only direct evidence of defendant Jackson's knowledge of regulation 37.1

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[27] Defendant Jackson was only charged in those counts of the indictment pertaining to the Lacey Act.

[28] *See* discussion, *supra*, at 20-21.

came from Ms. Gould. By the same token, there was strong inferential evidence from which the jury could have found, as evidently they did, that defendant Jackson knew that the sale of Lake Ontario salmon eggs for human consumption was illegal and that he was guilty of the charged crimes. That inference as to his knowledge could easily be drawn from the proof as to Jackson's position with Tempotech, the nature of his work there, as well as his close association with Robert Gehl. Thus when each of the factors identified by the *Hardy* Court is examined in the context of this case, the court does not find that defendant Jackson is entitled to a new trial. AUSA Benedict's remark in closing as to the defendants' failure to call any witnesses, while unfortunate and certainly uncalled for, is not, standing alone, the kind of remark which requires a new trial.

Second Circuit case law supports the same result. In *Follette, supra*, the Second Circuit considered, *inter alia*, a prosecutor's comment in summation as to the defendant's lack of contradictory evidence. In *Follette*, the Court "reviewed the many precedents which, in almost every instance, have 'held that remarks concerning lack of contradiction are forbidden only in the exceedingly rare case where the defendant alone could possibly contradict the government's testimony[.]' " *United States v. Dioguardi*, 492 F.2d 70, 82 (2d Cir.), *cert. denied*, 419 U.S. 587, 95 S.Ct. 134, 42 L.Ed.2d 112 (1974) (quoting *Follette*, 418 F.2d at 1269). After reviewing those cases, the Court concluded

> where the prosecutor confines himself to arguing the strength of his case by stressing the credibility and lack of contradiction of his witnesses, we will not be astute to find in this a veiled comment on the defendant's failure to testify even if in practical fact, although not in theory, no one else could controvert them.

Follette, 418 F.2d at 1270. At first glance it might appear that this case falls into that small category of "exceedingly rare"

cases described by the *Follette* Court.[29] Considering Benedict's summation in its entirety, though, the court construes his remark as to the defendants' failure to call witnesses as being the type of remark just described by the *Follette* Court. Thus, in accordance with the Second Circuit's implicit direction therein, this court will not read into the prosecutor's remark a "veiled comment on the defendant's failure to testify[.]" *See id.*

Moreover, according to the *Follette* Court, "[t]he trend has been, . . . , to treat the two adverbs [naturally and necessarily] in the conjunctive and to stress the 'necessarily.' " *Id.* at 1269. As previously explained in distinguishing *Hardy*, read in context, the court cannot find that the jury would "naturally and **necessarily** interpret" that singular, general remark, made while the prosecutor was discussing crimes with which defendant Jackson was not even charged, as a comment on defendant Jackson's failure to testify. Lastly, the court posits that any conceivable misunderstanding this particular remark by AUSA Benedict might have engendered on the part of the jury, as to defendant Jackson, was cured by the immediate curative instruction, which was in turn bolstered by the court's general instructions on burden of proof and the defendants' absolute right not to testify. *See United States v. Bubar*, 567 F.2d 192, 200 (2d Cir.), *cert. denied*, 434 U.S. 872, 98 S.Ct. 217, 54 L.Ed.2d 151 (1977); *see also United States v.* Knoll, 16 F.3d 1313, 1323 (2d Cir. 1994) (citation omitted) ("[A]ppellants have not shown substantial prejudice as a result of the prosecutor's statements, . . . , a particularly heavy burden inasmuch as the trial court gave a curative instruction as part of

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[29] The following observation by the Second Circuit in *Follette* demonstrates just how rare such cases are: "[W]e have discovered only four decisions by federal courts of appeals among the multitude that have been cited by counsel or disclosed by our own research, over the past half-century, where comments as to non-contradiction have led to reversal." 418 F.2d at 1270 (and cases cited therein), admittedly, the court's research as to such decisions in the last quarter of a century since *Follette* was not exhaustive, but given the court's general familiarity with the case law since then, it is reasonable to conclude that this trend has continued to this day.

its charge."). For all of these reasons, the court is unable to find that defendant Jackson was substantially prejudiced by the prosecutor's gratuitous remark about the defendants' failure to call witnesses. Accordingly, the court denies defendant Jackson's motion for a new trial based upon the prosecutor's claimed misconduct at various points during his summation.

2. Other Misconduct Claims

Not wanting to leave any stone unturned, the defendants also point to comments made by the prosecutor during the course of the trial which they claim, in combination with the comments analyzed in section II(B)(1)(c) above, violated their Fifth Amendment rights. Again, these comments were directed at the fact that the defendants' proof, or the lack thereof. More specifically, early on in the case the prosecutor stated, in the jury's presence, "[T]here is going to be expert testimony that both sides apparently are going to present." Tr. (Sept. 26, 1994) at 11-12. The defendants objected and moved for a mistrial; that motion was denied. A couple of days later, during defense counsel's cross-examination of a government witness, he offered a document into evidence. Tr. (Sept. 28, 1994 - afternoon) at 103. The government objected, stating, "[t]hey can offer whatever they want in their case[.]" *Id.*[30]

Neither of these comments, taken in isolation, or when considered in the context of the entire trial, is tantamount to serious misconduct. As to the former comment, in light of the defendants' pre-trial requests in connection with their anticipated expert, including a request for an adjournment so that that expert would have sufficient time to prepare, it was reasonable for the prosecutor to assume, at that point in time, that perhaps the defendants also intended to have an expert witness testify. The prosecutor cannot be faulted for what appears to have been a change in defense strategy midway through the trial. In addition, as to this remark, as well as the remark that defendants "can offer whatever they want in their

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[30] Eventually, the court overruled that objection. Tr. (Sept. 28, 1994 - afternoon) at 103-105.

case,"[31] it cannot be forgotten that both of these were but passing remarks in a fairly lengthy trial. Accordingly, the court finds that none of these remarks made during the course of the trial substantially prejudiced the rights of any of these defendants.

To summarize, a defendant seeking a new trial on the grounds of prosecutorial misconduct has a high hurdle to clear. In the present case, none of the defendants are able to clear that high hurdle. In his summation AUSA Benedict walked perilously close to that "fine line"[32] between permissible and impermissible argument, especially insofar as defendant Jackson is concerned. In the end, however, when his remarks are examined, as they must be, against the standards recited earlier, the court concludes that those remarks, whether viewed in isolation, or collectively, cannot support a finding that the Fifth Amendment rights of any of these defendants were violated. The most that can be said of the AUSA's remarks in this case, particularly his questioning during summation of the defendants' decision not to call any witnesses, is that such remarks amounted to prosecutorial overkill; but, as the case law makes clear, prosecutorial overkill is not equivalent to prosecutorial misconduct.

Broadly grouped, there are three remaining grounds for defendants' motion for a new trial: prejudicial surplusage in the indictment; evidentiary errors; and claimed errors in the jury instructions. In contrast to the prosecutorial misconduct argument, most of these arguments, including all of those made as part of defendants' Rule 34 motion, are familiar to the court, some more so than others. Given that familiarity, together with the ample record arising out of the extensive pre-trial motions and motions *in limine*, as well as other pre-trial submissions, there is no need for the court to engage in an in-depth analysis of the remaining defense arguments. Instead, the court will only briefly address these remaining arguments.

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[31] *Id.* at 103.

[32] *See Parker, supra*, 903 F.2d at 98.

C. Prejudicial Surplusage

The defendants maintain, as they did on at least two occasions prior to trial, that "[t]he Indictment contains a number of inflammatory and prejudicial references that have nothing to do with the crimes charged." New Trial Memorandum at 9. The court abides by its prior rulings that the language in the indictment of which defendants complaint, is not so prejudicial and inflammatory so as to require that it be stricken; and the court sees absolutely no basis for so doing, particularly at this late juncture.

D. Evidentiary Errors

There are four claimed evidentiary errors by the defendants. Here again, obviously, these arguments are not new to the court in that they were made in some instances just prior to trial, and in others during the trial.

1. Predicates of Investigation

The first asserted evidentiary error is that the court should not have permitted James Mazuicca of the New York State Department of Environmental Conservation ("DEC") to testify by way of "background" as to predicate information which caused an investigation to be launched into defendants' activities. The defendants believe that this background information, which included, among other things, a statement that Mazuicca was informed that "Mr. Gehl was in New York City at the time hiding the eggs that we had asked them not to sell[,]"[33] was improper hearsay in that it was offered for the truth of the matter asserted, at least in the defendants' opinion. They also maintain that this proof was improperly admitted because it was irrelevant. The government did not bother to address this issue in its post-trial opposition memorandum.

The settled rule in this Circuit is that " '[w]hen statements by an out-of-court declarant are admitted as background, they

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[33] Tr. (Sept. 28, 1994 - morning) at 89.

are properly so admitted not as proof of the truth of the matters asserted but rather to show circumstances surrounding the events, providing explanation for such matters as the understanding or intent with which certain acts were performed." *United States v. Harwood*, 998 F.2d 91, 99 (2d Cir.), *cert. denied*, __U.S.__, 114 S.Ct. 456, 126 L.Ed.2d 388 (1993) (quoting *United States v. Pedroza*, 750 F.2d 187, 200 (2d Cir. 1984)) (other citations omitted). Here, contrary to what defendants assert, the background testimony of Mr. Mazuicca was not offered for the truth of the matter asserted. In fact, the court specifically instructed the jury accordingly at that time. *See* Tr. (Sept. 28, 1994 - morning) at 89-90. Rather, this testimony was offered to show why Mr. Mazuicca took certain actions in connection with his investigation of the defendants herein. Moreover, even if the court did err in allowing this testimony, such error was harmless in light of the record as a whole. *See Harwood*, 998 F.2d at 99 (citing, *inter alia*, Fed. R. Crim. P. 52(a)).

2. Gehl's Prior Guilty Plea

Next, making the exact same arguments as they did in their "Motion to Exclude 404(b) Evidence," the defendants maintain that the court improperly admitted Robert Gehl's guilty plea from the Middle District of Florida. This argument too was the subject of quite extensive pre-trial argument, and the court abides by its prior ruling, and declines to find that a new trial is justified on the basis of this purported error.

3. Inadequate Foundation for Certain Government Exhibits

The defendants contend that there was an inadequate foundation for government exhibits JM 1-5, 8, 10-21 and 24 and thus the court improperly admitted those exhibits. Those documents were either produced pursuant to a grand jury subpoena or were seized pursuant to two search warrants executed as part of the investigation of this case. The court declines to revisit this issue which was the subject of some argument during the trial; and the court further denies defendants' motion for a new trial on the basis of this claimed error.

4. Statements of Wendy Gould

All of the defendants bitterly contend that the court should not have allowed Ms. Gould, a former FDA inspector, to testify that the defendants advised her that they were aware that it was illegal to make caviar out of Lake Ontario salmon eggs. The basis for this argument is that, according to the defendants, the government did not fully comply with Fed. R. Crim. P. 16(a)(1)(A), with respect to discovery pertaining to Ms. Gould's testimony. More specifically, the defendants contend[34] that the government did not comply with the following portion of that Rule:

> Upon request of a defendant the government shall disclose to the defendant and make available for inspection, copying, or photographing: . . . ; that portion of any written record containing the substance of any relevant oral statement made by the defendant whether before or after arrest in response to interrogation by any person then known to the defendant to be a government agent; . . . .

Fed. R. Crim. P. 16(a)(1)(A).

This is yet another controversy which was the subject of thorough argument, both oral and written, during the trial and the record reflects that. Indeed, the court gave careful consideration to the parties' respective arguments on this issue and then made an oral ruling in chambers, and the record should also reflect that ruling. Nothing in the papers currently before the court has caused the court to retreat, in any way, from its prior ruling on this issue. Thus, obviously, the court is not persuaded that the prosecutor's supposed non-compliance with Rule 16(a)(1)(A) entitles the defendants to a new trial.

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[34] In a reversal of roles, the Gehl defendants make a rather cursory argument on this point, and then go on to adopt the arguments, both oral and written, defendant Jackson made on this issue during the trial. *See* New Trial Memorandum at 13.

E. Jury Instructions

Insofar as the jury charge is concerned, the defendants contend that the court erred in failing to give a multiple conspiracies instruction in connection with count seven. In *United States v. Medina*, 944 F.2d 60 (2d Cir. 1991), *cert. denied*, __U.S.__, 112 S.Ct. 1508, 117 L.Ed.2d 646 (1992), the Second Circuit repeated the settled rules with respect to the failure to given a multiple conspiracies charge:

> Even if a multiple conspiracies charge should have been given, the failure to do so does not automatically require reversal. . . . To obtain a reversal, a defendant must show both the likelihood of multiple conspiracies having existed, and substantial prejudice resulting from the failure to give the requested charge. . . . In order to demonstrate the existence of multiple conspiracies, a defendant must show evidence of separate networks operating independently of each other.

Id. at 65 (internal quotations and citations omitted).

Here, the defendants have not shown that they suffered "substantial prejudice" due to the court's refusal to give the requested multiple conspiracies charge. Nor have they shown evidence of "separate networks operating independently of each other." *See id.* Thus, the court denies defendants' motion for a new trial insofar as it is premised upon this claimed error in the jury instructions. Likewise defendants' due process rights were not violated, as they contend, because of the court's refusal to charge that to prove a Lacey Act violation, the government had to prove that the defendants knew of the existence of regulation 37.1. Consequently, the court declines to upset the convictions and grant defendants a new trial on the basis of these asserted errors in the jury instructions.

To summarize, the court does not find persuasive any of the arguments offered by the defendants in support of their motion for a new trial, and the court hereby denies the same in its entirety.

III. Rule 34 Motion for Arrest of Judgment

Rule 34 motions for arrest of judgment " '[a]re allowed **only** (1) where the indictment charges no offense and (2) where the court had no jurisdiction over the offense charged.' " *United States v. Carbonell-Iznaga*, 87 CR. 0518, 1987 U.S. Dist. LEXIS 12:33, at *8 (S.D.N.Y. Dec. 31, 1987) (emphasis added) (quoting *United States v. Rosenberg*, 195 F.2d 583, 603 (2d Cir. 1952)) (other citations omitted). "In deciding a Rule 34 motion: 'a court may not look beyond the face of the 'record,' which consists of 'no more than the indictment, the plea, the verdict . . . when the plea is not guilty . . . and the sentence; it does, not cover anything which took place in pays [sic].' " *Id.* at *9 (quoting *United States v. Stolon*, 555 F.Supp. 238, 239 (E.D.N.Y. 1983) (quoting in turn *United States v. Bradford*, 194 F.2d 197, 201 (2d Cir. 1952) (and cases collected therein)).

In the present case, none of the defendants challenge the court's jurisdiction, rather, they make the following arguments which the court deems are properly made under Rule 34: (1) invalidity of regulation 37.1; (2) compliance with the Lacey Act; (3) related Fifth and Sixth Amendment violations; and (4) disjunctive pleading. Once again, none of these argument are new to the court; they were all the subject of extensive pre-trial motions, especially the challenge to regulation 37.1. The defendants have not pointed to any change in the law, nor have they provided the court with any other compelling reason as to why the court should retreat from its earlier rulings on these issues. In short, nothing has changed in the intervening months since these arguments were first posited to the court which persuades it to modify or reverse any of its prior rulings on these issues. Accordingly, the defendants' motion for an arrest of judgment under Fed. R. Crim. P. 34 is denied in its entirety.

For all of the reasons set forth above, the motions for a judgment of acquittal pursuant to Fed. R. Crim. P. 29, for a new trial pursuant to Fed. R. Crim. P. 33, and/or for an arrest of judgment pursuant to Fed. R. Crim. 34 made by the

defendants, Robert J. Gehl, George Jackson, Tempotech Industries, Inc. and Gehl Productions, Inc., are hereby DENIED in all respects.

IT IS SO ORDERED.

DATED: February 2, 1995
Syracuse, NY

/s/Neal P. McCurn
Neal P. McCurn
Senior U.S. District Judge